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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2017-2018

CR-15-1501

John Fitzgerald Betton

v.

State of Alabama

Appeal from DeKalb Circuit Court
(CC-98-193; CC-98-193.61)

WINDOM, Presiding Judge.

John Fitzgerald Betton appeals his sentence of life in prison without the possibility of parole. Betton was convicted of two counts of first-degree robbery, see § 13A-8-41, Ala. Code 1975; one count of attempted murder, see

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§ 13A-6-2 and § 13A-4-2, Ala. Code 1975; one count of first-degree assault, see § 13A-6-20, Ala. Code 1975; and one count of murder made capital because it was committed during a robbery, see § 13A-5-40(a)(2), Ala. Code 1975. He was sentenced to life in prison for his 2 first-degree-robbery convictions and his attempted-murder conviction, to 20 years in prison for his first-degree-assault conviction, and to life in prison without the possibility of parole for his capital-murder conviction. The circuit court ordered that Betton's sentences run concurrently.

On direct appeal, Betton's appellate counsel filed a "no-merit" brief in substantial compliance with Anders v. California, 386 U.S. 738 (1967). This Court followed the procedure established in Anders and ultimately affirmed Betton's convictions and sentences. On April 10, 2001, this Court issue the certificate of judgment.

On February 28, 2005, Betton filed a postconviction petition pursuant to Rule 32, Ala. R. Crim. P., attacking his convictions and sentences. On March 10, 2005, the State filed a response and motion to dismiss Betton's Rule 32 petition. On July 29, 2005, the circuit court granted the State's motion

and dismissed Betton's petition. On appeal, this Court remanded the cause to the circuit court with instructions for it to issue specific findings of fact regarding two of Betton's claims. On return to remand, this Court affirmed the circuit court's decision denying relief.

On June 12, 2012, the Supreme Court of the United States issued its decision in Miller v. Alabama, 567 U.S. 460 (2012). In Miller, the Supreme Court held that mandatory sentences of life in prison without the possibility of parole for juveniles who commit capital murder constitutes cruel and unusual punishment under the Eighth Amendment. Specifically, "[t]he Supreme Court [in Miller] concluded that the mandatory sentencing scheme was flawed because it did not give consideration to the character and record of the individual offender, the circumstances of the offense, or the possibility of compassionate or mitigating factors related to youth." Ex parte Henderson, 144 So. 3d 1262, 1278 (Ala. 2013). The Court then held that the Eighth Amendment demands that "a judge or jury ... have the opportunity to consider mitigating circumstances before imposing [life in prison without the possibility of parole] for juveniles" and have the opportunity

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to impose a sentence that includes the possibility of parole. Miller, 567 U.S. at 489.

On June 25, 2013, Betton filed a successive Rule 32 petition in which he argued that his mandatory sentence of life in prison without the possibility of parole was unconstitutional under the Supreme Court's decision in Miller because he was 15 years old when he committed his capital offense. The State filed a motion to dismiss. On May 10, 2016, the circuit court held a hearing during which the State withdrew its motion to dismiss. The circuit court granted Betton's Rule 32 petition, vacated his sentence, and scheduled a new sentencing hearing. At the conclusion of Betton's new sentencing hearing, the circuit court again sentenced him to life in prison without the possibility of parole.

The facts of Betton's crime are as follows. Jonathon Phillips's mother was married to, but separated from, Antonio Andrade, Sr. Phillips knew that Andrade did not have a bank account; rather, he sent some of the family's money to relatives in Mexico and kept the remainder in his house. On November 23, 1997, Betton -- then 15 years old -- Phillips, Tim Dupree, and Reynard Ford, decided to rob someone. To

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prepare, these three went to Betton's sister's house to get, among other things, items to hide their identities. Dupree had a BB gun and Betton had a pistol.

Phillips suggested to the other three that they rob Andrade. Betton, Dupree, and Ford agreed, and they drove to Andrade's house, where Andrade and his two sons, Antonio and Apolinar, were watching a soccer match. The group agreed that Betton, Dupree, and Ford would break into Andrade's house and rob him while Phillips waited at the car. In accordance with their plan, Phillips drove past the house and parked. Phillips then opened the hood of the car to make it appear as if he were having car trouble, and Betton, Dupree, and Ford left to rob Andrade.

Betton, Dupree, and Ford broke into Andrade's house and demanded money from him and his two sons. After robbing the Andrades, Betton shot Andrade and both of his sons. Andrade and Antonio survived; however, 19-year-old Apolinar died as a result of a gunshot wound to the chest.

Betton was arrested, and he gave a statement in which he admitted to being with Phillips, Dupree, and Ford during the robbery. He, however, claimed that he had stayed at the car

with Phillips during the robbery and blamed Dupree and Ford for the murder and the attempted murders.

At Betton's resentencing hearing, Betton presented testimony from Fossie Thomas Brown, a Chaplain with the Alabama Department of Corrections. Brown testified that Betton lived in the honor dorm at St. Clair Correctional Facility and that he worked in the chaplain's office. Brown said that Betton was a dorm leader and taught Fatherhood Initiative classes. Brown said that, while working at the chaplain's office, Betton tried to ensure Brown's safety. Brown testified that Betton had obtained his general equivalency diploma and learned to be a barber. Brown further testified that he would like for the court to sentence Betton to life in prison with the possibility of parole.

Justin Watts, a correctional officer at St. Clair, testified similarly to Brown. According to Watts, he was familiar with Betton, describing him as a model prisoner. He testified that Betton had received only one disciplinary during Watts's time at St. Clair Correctional Facility. Watts testified that Betton was involved in three prison programs, including Fatherhood Initiative. Watts "sat in the class and

watched [Betton] mentor younger inmates -- younger less-experienced inmates and try to help them become better fathers and better brothers ... things of that nature." (R. 20.) Watts described instances in which Betton had mediated volatile situations between officers and inmates and had helped officers keep the peace in the prison. Watts testified that he felt like Betton would be a good candidate for parole and would be someone who could live successfully outside the prison system.

Betton testified on his own behalf. According to Betton, he had been in prison for almost 19 years. Betton described his childhood as less than ideal. According to Betton, he saw his father only periodically and spent most of his time with his mother and great-grandmother. Betton testified that he had an older sister, a younger sister, and a younger brother. Betton stated that his great-grandmother passed away when he was 10 years old and that after her death, his "mother lost her way." (R. 38.) At that point, Betton's mother started using drugs and began neglecting her children. Betton's mother remarried, became transient, and at times left her

children with their step-father. Eventually, Betton's mother and stepfather divorced.

When Betton was 11 years old, the family moved to Ohio. There, they did not have a stable place to live and a church "put [the family] up in a hotel." (R. 41.) At times, they also lived with family members. The family lived in Ohio for about a year and then moved to Georgia to live with a second great-grandmother. While in Georgia, they lived in a poor neighborhood where Betton was exposed to crime, violence, drugs, and alcohol. During this time, Betton started using and selling drugs. He explained that his motive for selling drugs was not necessity, but to enable him to purchase luxury items his family could not otherwise afford.

During his time in Georgia, Betton was sentenced to boot camp for being in a stolen car. While he was in boot camp, his family moved back to Alabama. When Betton was released from boot camp, he joined his family in Alabama. During that time, he was disobedient toward his mother and began associating with older people who were involved in criminal activity.

Betton testified to his accomplishments while in prison. According to Betton, he lives in the faith-based honor dorm, where he is a facilitator. Betton told the circuit court that he was involved in the Fatherhood Initiative, Anger Management, Reality Therapy, and Stress Management programs. Betton testified that he had participated in Convicts Against Violence. Betton said he had earned his GED and had been learning trades in heating, ventilating, and air conditioning, as well as electrical. Betton further testified that he is a different person than when he entered prison.

While testifying, Betton described the crimes for which he was incarcerated. Betton stated that Phillips had the idea to commit a robbery. He testified that they needed a gun, so Betton stole one from a friend of his mother's. They then went to the Andrades' house, kicked in the door, and robbed the Andrades. Betton testified that, during the robbery,

"[t]he older gentleman, older man, came at Mr. Ford, who originally had the gun. He ran at him and tried to wrestle the gun away from him. And the gun went off. And the old man grabbed his stomach. And then the two guys that were in the living room went into the bedroom and came back out. And they had some bills in their hands -- some money -- and they started giving us the money. And they had some marijuana, and they started giving us the marijuana, also. ... And by that time Ford and the old man had

separated. And so we were going back out of the house."

(R. 49-50.) As they were leaving, the two sons were shot. Betton testified that Ford shot all three people.

The State presented evidence establishing that Betton was the shooter. Specifically, the State presented evidence that

"three black men went to the back of the [Andrades'] house. That they went in, told [the Andrades] it was a robbery and wanted the money. A shot was fired into the ceiling. When the shot was fired into the ceiling, [Andrade] bec[a]me somewhat ... aggressive, and the gun ... jammed.

"[The] investigation show[ed] that Mr. Betton took that jammed gun and cleared it. ... At that time, [Betton] had the gun. [Andrade] was shot as he bec[a]me aggressive, and then they obtained the money. And after the money was taken, then the other two gentlemen were shot."

(R. 114-15.)

The State also presented testimony that, at the time of the crime, Betton's mother was unemployed and the family was receiving welfare money. However, Betton's family lived in a three-bedroom, one-bathroom house in Fort Payne, and had two cars. Betton was of average intelligence and did not suffer from mental-health issues.

At the conclusion of the hearing, the circuit court sentenced Betton as follows:

"I want to tell you, personally, that this -- as you have stated, this is a tough decision. But it has nothing to do with the legal ramifications that I feel. It has everything to do with I find this case to be extremely sad. I find you -- and tragic. I find you to be a very intelligent man, very well spoken. I -- you're impressive. You're bright. And at the time you were 15 years old, and I can understand that.

"But I also find it to be sad because Apolinar, if I can say his name correctly, was also a teenage young man. And he also obviously was an industrious young man, and from the record that I have read getting ready for this sentence -- and I have spent a lot of time reading the file -- his family had immigrated to this country and apparently worked enough to have some money saved up. They might not have trusted the banking system, and it was their fault, I guess, they had money laying around. But I haven't been able to get over the fact that there [were] three men, a father and his two sons, that were sitting in a living room one night watching a television getting ready for a football game when their home was invaded. They weren't involved in a drug deal. They were not out looking for trouble. The Blake community is not known to be a troubled neighborhood. And they were invaded in the middle of the afternoon and shot and left for dead.

"And as much as I appreciate what the prison system has done for you, and as much as I believe that you are a bright and nice young man, based on the law as I understand it and the sentencing guidelines -- the sentencing rules as I understand it, I am going to sentence you to life without the possibility of parole."

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(R. 154-56.) The circuit court did not issue written findings of fact regarding the factors it considered in sentencing Betton.

On appeal, Betton argues, among other things, that the circuit court failed to consider the sentencing factors established in Miller, Montgomery v. Louisiana, ___ U.S. ___, 136 S. Ct. 718 (2016), as revised (Jan. 27, 2016), and Ex parte Henderson. According to Betton, the circuit court's decision focused on the circumstances of this crime to the exclusion of all other relevant sentencing factors. He then argues that, because the circuit court failed to consider relevant sentencing factors, his sentence must be reversed.

"In Miller, the United States Supreme Court held that 'the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders' because, 'the mandatory sentencing schemes ... violate [the] principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.'" Click v. State, 215 So. 3d 1189, 1191-92 (Ala. Crim. App. 2016) (quoting Miller, 567 U.S. at 479). The Miller Court reasoned:

"Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features -- among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him -- and from which he cannot usually extricate himself -- no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth -- for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys."

Click, 215 So. 3d at 1192 (quoting Miller, 567 U.S. at 477-78). In striking down mandatory sentences of life in prison without the possibility of parole for juveniles who commit capital murder, the Court did not hold that juveniles are categorically exempt from such a sentence. Miller, 567 U.S. at 479. "Although Miller did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect "irreparable corruption."" Montgomery, ____

U.S. at ___, 136 S. Ct. at 726 (quoting Miller, 567 U.S. at 479-80, quoting in turn, Roper v. Simmons, 543 U.S. 551, 573 (2005)). Thus, "Miller 'mandates ... that a sentencer follow a certain process -- considering an offender's youth and attendant characteristics' -- before 'meting out' a sentence of life imprisonment without parole." Click, 215 So. 3d at 1192 (quoting Miller, 567 U.S. at 483). "'[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.'" Click, 215 So. 3d at 1192 (quoting Miller, 567 U.S. at 483). Consequently, "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." Montgomery, 136 S. Ct. at 735 (quoting Miller, 567 U.S. at 465). The Court explained that "[t]he hearing ... gives effect to Miller's substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." Montgomery, ___ U.S. at ___, 136 S. Ct. at 735.

When Miller was decided, Alabama's capital-murder statute provided for two possible sentences -- life in prison without the possibility of parole or death. See § 13A-5-39(1), Ala. Code 1975. Juveniles, however, were not eligible for a sentence of death; therefore, the only sentence available for a juvenile convicted of capital murder was life in prison without the possibility of parole. See Ex parte Henderson, 144 So. 3d at 1266-84; Miller v. State, 148 So. 3d 78 (Ala. Crim. App. 2013). In the wake of Miller, both the Alabama Supreme Court and the Alabama Legislature acted to amend our capital-murder statutes so as to provide juveniles with individualized sentencing and an opportunity to have a sentence imposed that includes the possibility of parole.

First, in Ex parte Henderson, our Supreme Court was asked to order the dismissal of capital-murder indictments against two juveniles because Alabama law at the time mandated a sentence of life in prison without the possibility of parole. Ex parte Henderson, 144 So. 3d at 1262-84. The Alabama Supreme Court recognized that the Miller decision "was not a categorical prohibition of a sentence of life imprisonment without parole for juveniles, but rather required the

sentencer to consider the juvenile's age and age-related characteristics before imposing such a sentence." Ex parte Henderson, 144 So. 3d at 1280. "Miller mandates individualized sentencing for juveniles charged with capital murder rather than a 'one size fits all' imposition of a sentence of life imprisonment without the possibility of parole." Ex parte Henderson, 144 So. 3d at 1280. However, the Henderson Court "recognize[d] that a capital offense was defined under our statutory scheme as one punishable by the two harshest criminal sentences available: death and life imprisonment without the possibility of parole." Ex parte Henderson, 144 So. 3d at 1280. To ameliorate the unconstitutional portion of Alabama's capital sentencing scheme as it applied to juveniles, the Alabama Supreme Court "[s]ever[ed] the mandatory nature of a life-without-parole sentence for a juvenile to provide for the ... possibility of parole." Ex parte Henderson, 144 So. 3d at 1281.

After severing from the statute the mandatory nature of a sentence of life in prison without parole for juveniles convicted of capital offenses, the Alabama Supreme Court established factors courts must consider when deciding whether

life in prison with the possibility of parole would be an appropriate sentence for a juvenile. Id. at 1283-84. Specifically, the Court held

"that a sentencing hearing for a juvenile convicted of a capital offense must now include consideration of: (1) the juvenile's chronological age at the time of the offense and the hallmark features of youth, such as immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile's diminished culpability; (3) the circumstances of the offense; (4) the extent of the juvenile's participation in the crime; (5) the juvenile's family, home, and neighborhood environment; (6) the juvenile's emotional maturity and development; (7) whether familial and/or peer pressure affected the juvenile; (8) the juvenile's past exposure to violence; (9) the juvenile's drug and alcohol history; (10) the juvenile's ability to deal with the police; (11) the juvenile's capacity to assist his or her attorney; (12) the juvenile's mental-health history; (13) the juvenile's potential for rehabilitation; and (14) any other relevant factor related to the juvenile's youth."

Ex parte Henderson, 144 So. 3d at 1284. See also Foye v. State, 153 So. 3d 854, 864 (Ala. Crim. App. 2013). The Court "recognize[d] that some of the factors may not apply to a particular juvenile's case and that some of the factors may overlap." Ex parte Henderson, 144 So. 3d at 1284.

After the Alabama Supreme Court decided Ex parte Henderson, the Alabama Legislature amended our capital-sentencing statutes to comply with the guidelines of Miller.

First, the Legislature amended § 13A-5-2(b) to provide that "[e]very person convicted of murder shall be sentenced by the court to imprisonment for a term, or to death, life imprisonment without parole, or life imprisonment in the case of a defendant who establishes that he or she was under the age of 18 years at the time of the offense, as authorized by subsection (c) of Section 13A-6-2." The Legislature redefined a capital offense as, "[a]n offense for which a defendant shall be punished by a sentence of death or life imprisonment without parole, or in the case of a defendant who establishes that he or she was under the age of 18 years at the time of the capital offense, life imprisonment, or life imprisonment without parole, according to the provisions of this article."

§ 13A-5-39(1), Ala. Code 1975. The Legislature also provided:

"If the defendant is found guilty of a capital offense or offenses with which he or she is charged and the defendant establishes to the court by a preponderance of the evidence that he or she was under the age of 18 years at the time of the capital offense or offenses, the sentence shall be either life without the possibility of parole or, in the alternative, life, and the sentence shall be determined by the procedures set forth in the Alabama Rules of Criminal Procedure for judicially imposing sentences within the range set by statute without a jury, rather than as provided in Sections 13A-5-45 to 13A-5-53, inclusive. The judge shall consider all relevant mitigating circumstances."

§ 13A-5-43(e), Ala Code 1975. The Legislature further established that, "[i]f [a juvenile] defendant is sentenced to life [in prison with the possibility of parole] on a capital offense, th[at] defendant must serve a minimum of 30 years, day for day, prior to first consideration of parole."¹ Id.

Here, the record is unclear regarding whether the circuit court considered the sentencing factors outlined in Ex parte Henderson to determine whether Betton was "irreparabl[y] corrupt[ed]" or whether his "crime[] reflect[ed] transient immaturity." Montgomery, ___ U.S. at ___, ___, 136 S. Ct. at _____

¹The Legislature amended § 13A-6-2(c), Ala. Code 1975, to provide:

"Murder is a Class A felony; provided, that the punishment for murder or any offense committed under aggravated circumstances by a person 18 years of age or older, as provided by Article 2 of Chapter 5 of this title, is death or life imprisonment without parole, which punishment shall be determined and fixed as provided by Article 2 of Chapter 5 of this title or any amendments thereto. The punishment for murder or any offense committed under aggravated circumstances by a person under the age of 18 years, as provided by Article 2 of Chapter 5, is either life imprisonment without parole, or life, which punishment shall be determined and fixed as provided by Article 2 of Chapter 5 of this title or any amendments thereto and the applicable Alabama Rules of Criminal Procedure."

726, 735 (other citations and quotations omitted). The record is also unclear regarding which factors the circuit court found applied to determine the appropriate sentence or what facts the circuit court found supported those factors. See Ex parte Henderson, 144 So. 3d at 1284 (recognizing that "some of the factors may not apply to a particular juvenile's case and that some of the factors may overlap"). The lack of findings of fact has hampered this Court's ability to review the proportionality of Betton's sentence.² Cf. Ex parte Cochran, 500 So. 2d 1179, 1187 (Ala. 1985) ("The trial judge's order does not state whether he considered the evidence offered by defendant and then determined that it was insufficient or whether he merely precluded it without consideration. Without knowing what the trial judge did, we are unable to properly review his sentencing decision."); Hooks v. State, 534 So. 2d 329, 366 (Ala. Crim. App. 1987).

²Specific, written findings of fact may not be required in every instance in which a juvenile is sentenced to life in prison without the possibility of parole. This Court can foresee instances in which the record contains sufficient indications of the factors and facts considered by the trial court to enable proportionality review. In this case, however, the record is not sufficient and a remand is required.

Consequently, this cause is remanded to the circuit court with instructions for it to consider the sentencing factors established in Ex parte Henderson and to issue specific, written findings concerning which factors it finds to apply, the facts supporting those factors, and the weight given to those factors. Cf. Gaddy v. State, 698 So. 2d 1100, 1146 (Ala. Crim. App. 1995). The circuit court shall take all necessary action to see that the circuit clerk makes due return, which includes the circuit court's written findings of fact, to this Court at the earliest possible date and by no later than 35 days from the release of this opinion.

REMANDED WITH INSTRUCTIONS.

Welch, Kellum, Burke, and Joiner, JJ., concur.